Indigenous Knowledge in Law, Literature & Sovereignty

By Zachary Goldman
For
Dr. Lorraine Weir
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Abstract

Indigenous Knowledge (IK) has been broadly defined by Mohawk scholar Jameson Brant, as “A body of information about the interconnected elements of the natural environment which traditional indigenous people have been taught, from generation to generation, to respect and give thanks for" (in Bombay 1996 [cited in Menzies & Butler 2006:6]). Following Brant, Fikret Berkes defines Traditional Ecological Knowledge (TEK), which falls within the broader scope of IK, as “a cumulative body of knowledge, practice and belief, evolving by adaptive processes and handed down through generations by cultural transmission about the relationship of living beings (including humans) with one another and with their environment” (Berkes 1999:8). Menzies & Butler, in their chapter *Understanding Ecological Knowledge,* write, “TEK is rooted in, and informed by, a traditional or customary lifestyle, but it adapts to change and incorporates contemporary information and technology. New information is continually added and old information deleted as the environment is transformed, as weather patterns shift, or as species are wiped out or introduced…. “ (2006:7). It is through these understandings of Indigenous Knowledge as dynamic, malleable, and deeply rooted, that I want to bring it into a discussion about Oral History and Indigenous Literature. I will begin by examining how the use of Indigenous oral histories in Canadian law reflects an epistemological shift in Canadian society’s understanding of law that simultaneously allows for a repatriation of Indigenous land & life, but threatens to subsume Indigenous thought. Using an analysis of Eden Robinson’s writing strategies in Monkey Beach, I will then argue that Indigenous Literature reflects a realm where Indigenous histories can be shared without subsuming them within Canadian Literature writ large. Finally, I will ask the question, “Is Indigenous Knowledge Incommensurable with Canada”, leaving it purposefully unanswered.

Oral Tradition in and as Law

The use of oral history in the courts represents not only an epistemological shift in how Indigenous Knowledge can influence Canadian Law but vice versa. Oral history has been historically contested by the Crown because the “common-law legal world associates the oral and the sensory with fraud” (Hibbits 1992: 896; cited in Miller 2011: 2). For example, when Johnny David (Maxlaxlex) provided oral history of the Wet'suwet'en people to the court during the *Delgamuukw v British Columbia* case, he drew from thousands of years worth of collective knowledge passed down to him by his forebears. He spoke the law of the Wet’suwet’en people to the Canadian courts so that they would recognize Gitxsan and Wet’suwet’en rights and titles

on their territories (Mills 1997; Daly 1995; David 2005). Such oral histories are not open to the kinds of cross-examination which regularly take place in Canadian courts. Richard Daly, one of the expert witnesses in the Delgamuukw case, describes the scenario using a hypothetical Gitxsan female chief,

> "But here on this witness bench she is not accorded the smallest scrap of respect. Any old lawyer can interrupt her words whenever she or he likes. The Judge does the same. Then they ignore her and argue fiercely about her words [oral narratives] or the 'justice' of admitting them into the evidence" (2005:6-7).

When Judge McEachern dismissed the oral history of the Wet'suwet'en and Gitxaan, along with the expert testimony of the anthropologists, he did so in part because he felt that oral history is unreliable because of its open-ended system (Mills 1997; Miller 2011; see Cruikshank 1994). The dismissal of the oral history component was tantamount to dismissing the entirety of Gitxsan and Wet'suwet'en history, rendering it void and reinforcing ideas of *terra nullius*. Anthropologist Robert Paine wrote in response to the dismissal:

> In McEachern's view what the Gitxsan and Wet'suwet'en were claiming as literally true is not so, it is "only" myth; and the Gitxsan and Wet'suwet'en felt McEachern rejected their myths because (I suppose them to say), "He says they are not literally true and yet we do not present them as literal truths in the way the judge means when he speaks of something being literally true or not." There are different denotations of *literal* here; for the Gitxsan and Wet'suwet'en, their myths are "literally true" in the sense that they carry an "*ipso facto* truth" (Brown and Roberts 1980:8 cited in Paine 1996:61)

What the Canadian courts miss in their deliberations about the validity of Indigenous oral histories, is that these oral histories also *constitute the law* of the Indigenous nation in question. They are, or rather should be, on equal footing with the Canadian legal system. The *Kungax* and *Adaawk* of the Gitxsan and Wet'suwet'en are not simply stories whose validity can be questioned, (although protocol exists for questioning them, see Mills 1997) they are *the laws* of those nations. Antonia Mills writes in *Eagle Down is Our Law* that, "McEachern misinterpreted our attempts to translate and explain Witsuwit'en and Gitksan societies. He saw us, not as attempting a cultural translation, but as advocating the wholesale adoption of Gitksan-Witsuwit'en values" (Mills 1997:28). The reality is quite the opposite, colonialism has enforced settler values onto Indigenous people since The Age of Discovery, and *Delgamuukw v British Columbia* was an argument about reasserting Indigenous rights and titles in the face of subjugation.

Since Delgamuukw, oral history has been regularly incorporated into legal proceedings through the *Specific Claims Tribunal Act, 2008* c. 22, 13(1b) (Miller 2011: 2). While this incorporation has been useful for evaluating oral narratives in land claim cases, the legal process favors the Crown through the process of discovery. Through his interviews with professional technicians working on behalf of the Crown, legal anthropologist Bruce Miller found that Crown researchers, not Indigenous elders, determined what was relevant about oral narratives pertaining to a legal case, that the structure of recorded oral narratives inhibited the interpretations which could be gleaned from the material, and that researchers had to "cherry-pick" parts of oral narratives in order to garner relevant material for litigation (Miller 2011: 72-76).

These issues speak to the criticisms made by Aboriginal scholars Val Napoleon and John Borrows, who argue that Indigenous thought regarding the living nature of oral history and Canadian law may be incommensurable (Miller 2011: 87; see Napoleon 2005 and Borrows 2001). Julie Cruikshank's working definition of oral traditions is "broadly speaking, oral tradition (like history or anthropology) can be viewed as a coherent, open-ended system for constructing and transmitting knowledge" (Cruikshank 1994). However, more important than this working definition, is that oral histories are *tied to the land*. Leanne Simpson, in *Land as Pedagogy* writes about the Nishnaabeg concept of *gaa-izhi-zhaawendaagoziyaang* which translates to "given lovingly to us by the spirits" (2017a:149) and uses it in reference to an oral narrative about a young Nishnaabeg who learns how to make maple syrup from watching *Ajidaamo* (red squirrel). This story highlights how Indigenous lifeways and culture *come from the land,* which is often in direct contrast to the construction of Canadian Law. Similarly to Simpson, Albert (Sonny) McHalsie refers to the Sto:lo concept of *Sólh Téméxw* which translates to "taking care of the land", and demonstrates how oral histories incorporate the core values of *Sólh Téméxw* into their narratives (2007). McHalsie writes:

> Now, if you look at 1782, that's when the very first smallpox epidemic happened. None of the elders has ever said that the sores on the young boy were smallpox. But I think it was smallpox. One of our other biggest teachings is that whenever there's something bad, there's always got to be something good. It's kind of a balance, you never really know. An encounter with a *stl'aleqem* could be bad -- it could harm you. Or else you could get something good out of it, like the encounter with the water baby. (McHalsie 2007 116-17; cited in Miller 2011: 33)

Indigenous law is inexorably tied to the land as its foundation, and oral history is the vessel through which those laws are communicated (Cruikshank 1998; Simpson 2017a; McHalsie 2007). Therefore, while the incorporation of Indigenous oral histories in Canadian courts might be useful for litigating land claims, it also serves to eclipse Indigenous law if it becomes appropriated and watered down by researchers in their work with the courts.

Furthermore, the potential for appropriation extends to other disciplines, as Caroline Butler discusses at length in her chapter, *Historicizing Indigenous Knowledge.* In her chapter Butler writes, "the massive disruption of Indigenous resource use that [colonial] failing structures have perpetrated is forgotten in the efforts to promote Indigenous knowledge and management systems as the solution to the global crisis [in fisheries management]" (Butler 2006: 107). Promoting Indigenous management systems, more specifically the incorporation of Indigenous knowledge systems into Canadian structures (be they law or resource related) without holding those structures accountable for the massive disruptions they have caused is, as Butler writes, "practically and politically dangerous" (2006: 107), and would constitute a reification of assimilative colonial practices. Ultimately, Indigenous knowledge systems should not be evaluated in Western terms, as they constitute their own practices going back since time immemorial, and to this end strategies have been developed to resist the capability of settlers to appropriate indigenous narratives.

The Double Exposure Narrative Strategy and the Intersection of Adaptive Indigenous Knowledge: Monkey Beach

I want to now bring Indigenous literature, specifically Eden Robinson's *Monkey Beach* into this discussion around the double edged sword of acceptance/appropriation. In *Monkey*

Beach, the protagonist Lisamarie relies upon resurgent Haisla traditional knowledge to discover what happened to her brother lost at sea. The novel straddles settler and indigenous worldviews, indexing what David Graetner, in his paper *Something in Between,* calls "double exposure" (2015: 47-63). The dualities of Kitamaat/Kitamat, of B'gwus/Sasquatch, of Haisla Ghosts and settler psychoanalysis in Robinson's novel index the complex history of settler colonialism on the Northwest Coast and reflect, as Graetner writes, "the resurgent potential of the return of the oppressed" (ibid). Indeed, the little man character who visits Lisamarie's dreams to warn her about upcoming events is described initially as a Leprechaun who was, "a variation of the monster under the bed or the thing in the closet, a nightmare that faded with morning" (27). Graetner highlights the history of Irish immigration to the Northwest Coast writing, "The Irish played a fundamental role in building the colonial state and the nationalism that supports it, particularly in British Columbia, where conquering the 'wild' (a category that historically include Indigenous peoples) also meant establishing the Coast's identity as white, Anglo, and male." (Ward cited in Graetner 2015:47-63). Later on, this same little man character, is described as "wearing a cedar tunic with little armlets dangling around his neck and waist" (132) and is revealed by Ma-ma-oo to be a Haisla tree spirit, not something to be afraid of, but something from which Lisamarie draws power (152-153). The double exposure which Lisamarie struggles with throughout the novel is resolved in Monkey Beach's final chapter where Lisamarie reclaims her Haisla ancestry, meeting with the ghosts of her Uncle Mick, her grandmother Ma-ma-oo, and her brother Jimmy (Graetner 2015:47-63).

In the same sense that Lisamarie must deal with the double exposure of Haisla and settler history in the Pacific Northwest, Robinson herself also faces this dilemma while navigating the intersections of these worlds. In Kit Dobson's chapter *Indigeneity and Diversity in Eden Robinson's Work,* he writes, "Robinson is framed as representing a rare position from which to address her readers, a framing that grants her a degree of literary and social value. Colonial audiences are looking for the familiar figure of the Native Informant." Dobson continues, "The final unspeakability of Haisla life in English acts as a barrier to cross-cultural appropriation, an important limit on the novel's function as a sociological or ethnographic document" (Dobson 2009: 54). Robinson places herself into negotiating between a readership that, "generates unrealistic and problematic expectations about her work because of her role as a representative of her community" (Dobson 2009) while also "worry[ing] about ticking off the denizens of the spiritual world, not to mention the entire Haisla Nation" (Methot 2000: 13 cited in Dobson 2009: 54).

The positionality of Robinson's novel is such that it is not culturally specific enough to be read as a Haisla text because as Ma-ma-oo says, "in order to understand the old stories, you had to speak Haisla (Robinson 211), nor can its Indigeneity be denied. Lisamarie's proximity to the spirit world connects her to what literary critics see as a more traditionally native worldview (Dobson 2009: 56), yet Robinson's more mainstream writing style problematizes the classification of the novel as distinctly Native (Dobson 2009: 56-57; see Maracle 2007). Robinson's project with the novel is, to quote Dobson, "Lisa's growing up in a non-cohesive Indigenous community that has lost much of its self-understanding and whose violence closely mirrors that of white communities nearby" (2009: 61). To this end, the role of colonial violence is muted in the text (see the use of ellipses in the novel Dobson 2009: 61-64), with Robinson choosing instead to focus on violence within the community. Robinson is both "appropriating and reformulating the discourse of savagery" (Sugars 2004 cited in Dobson 2009).

Monkey Beach is still read as work critically oppositional to colonial pursuits, and it is marketed as such (by virtue of its Native-ness), but Robinson herself has gone to considerable efforts to facilitate an ambiguous reading of the text. This ambiguity exists in order to resist

having the novel be co-opted and appropriated into being representative of Canadian Literature as a whole (see Mathur 2005; 2007). By focusing on the issues within Lisamarie's community, mainstream readers will be able to see the familiar, but her writing strategy also allows those familiar with indigenous knowledge and history to explore the deeper meanings of Monkey Beach. Robinson's double exposure narrative strategy thus represents an adaptation of Indigenous Knowledge which incorporates settler narrative knowledge allowing both Haisla knowledge to be resurgent within indigenous readers and those familiar with indigenous histories, while simultaneously protecting the work from an uncritical appropriation of the narrative by Canadian Literature writ large (see Butler 2006; Dobson 2009; Graetner 2015; Mathur 2007).

On Decolonization: Is Indigenous Knowledge Incommensurable with Canada?

Reconciliation between two parties assumes that they are on equal footing, and the reality is that in the case of settler colonial Canada, they are not. John Borrows, writing on the controversial nature of oral histories illustrates quite clearly the footing that Canada and First Nations have:

> In many parts of the country certain oral traditions are most relevant to Aboriginal peoples because they keep alive the memory of their unconscionable mistreatment at the hands of the British and Canadian legal systems. Their evidence records the "fact" that the unjust extension of the common law and constitutional regimes often occurred through dishonesty and deception, and that the loss of Aboriginal land and jurisdiction happened against their will and without their consent. These traditions include memories of the government's deception, lies, theft, broken promises, unequal and inhumane treatment, suppression of language, repression of religious freedoms, restraint of trade and economic sanctions, denial of legal rights, suppression of political rights, forced physical relocation, and plunder and despoliation of traditional territories. (Borrows 2001: 10 cited in Miller 2011: 88)

Borrows does not ultimately argue for incommensurability between oral narratives and the court, although many other Indigenous scholars do. Borrows instead argues that Indigenous people need to have more control over the process of how oral narratives are used (2001 cited in Miller 2011: 89). This coincides in part with Chief Justice Beverly McLachlin, who wrote in *Mitchell v. M.N.R 2001,* "In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts" (Mitchell, para 27). I read this initially as an argument for Indigenous judges to preside over legal cases related to Indigenous knowledge, although it may not have been intended as such. Judges, regardless of their Indigeneity or not, are bound by the procedures of the court, and it is the procedures which must change if Indigenous knowledge is going to be used without being misrepresented (Miller 2011; Borrow 2001; Napoleon 2005 see Callison 1995).

Tuck & Yang, two proponents of the incommensurability argument, write that reconciliation is "concerned with questions of *what decolonization will look like? What will happen after abolition? What will be the consequences of decolonization for the settler?"* (2012: 35 emphasis in original). If reconciliation is going to occur, for them it will need to occur *after* decolonization because first and foremost, decolonization brings about the "repatriation of Indigenous life and land" (Tuck & Yang 2012: 1). They follow the critique of Frantz Fanon and Edward Said regarding "intellectual colonialism" and there are merits, and some cruel ironies, in this position.

Indigenous knowledge, and in particular oral histories, are routinely intertwined with the sacred, making them laden with meaning as we've seen from the discussion about oral history and literature above. Having scholars or judges cherry pick parts of narratives in the process of attempting to use indigenous knowledge risks defeating the purpose of bringing them into discussion if the knowledge holders will be met with disrespect in the court where they have been brought. On this, Indigenous lawyer Cynthia Callison proposes laws be introduced which protect Indigenous knowledge by recognizing Indigenous societies "ownership, control, and protection of oral traditions…. Emphasizing the relationship between oral traditions and all other aspects of our society" (1995: 172) and which prevent their appropriation by non-aboriginal people (1995). Callison denounces the use of oral narratives in court on the grounds that they will be appropriated, and therefore misrepresented, by the court (1995). Ironically, this would remove oral narratives from the court entirely, aligning Callison's position with others such as Judge McEachern.

Having Indigenous knowledge be incommensurable with the courts would've made Delgamuukw v British Columbia impossible for the Gitxsan and Wet'suwet'en plaintiffs to win, and yet it is undeniably true that the Canadian legal system does not treat Indigenous people or knowledge with the respect they deserve, and threatens to appropriate the teachings offered. Leanne Simpson responds to these kinds of questions by arguing for a resurgent indigeneity in everyday life. She states powerfully:

> "Following Nishnaabeg intellectual practices… you will find me relying on Nishnaabeg practices as theory, highlighting my own personal practice of Nishnaabeg intelligence and privileging the often painful and uncomfortable knowledge I carry that has been generated from existing as an Indigenous woman in the context of settler colonialism. My body and my life are part of my research, and I use this knowledge to critique and analyze. I will not separate this from my engagement with academic literature, because in my life these things are not compartmentalized." (Simpson 2017b)

Asserting one's Indigeneity in everyday contexts is perhaps the best way forward for Indigenous people to establish self-governance, and take control of the lands and life (to paraphrase Tuck & Yang) from which they have been dispossessed.

Conclusion

The aim of this paper thus far has been to problematize the incorporation of Indigenous ways of being into settler Canadian society writ large. I have tried to show that bringing Indigenous knowledge into conversation with Canada can be beneficial as in Delgamuukw, but it can also reconstitute colonial practices that appropriate Indigenous knowledge for colonial gain. The double exposure strategy is beneficial as a defensive tactic to protect Indigenous communities from the appropriative gaze of settler Canada, but it demands a discourse on reconciliation and decolonization which will determine whether or not Indigenous knowledge can be commensurable with the settler state apparatus. It is undeniable that settler Canada benefits from the incorporation of Indigenous knowledge practices, but that the same cannot be said the other way other around. Tuck & Yang write that decolonization "is not obliged to answer" the questions of what it will look like, or what the consequences will be for the settler, and I think that's fair, it would certainly be irresponsible of me to attempt that challenge here. Self Governance for Indigenous nations is the ultimate goal, the problem is how to get there.

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